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No. 89-487

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

THE REPUBLIC OF GHANA, THE
GHANA SUPPLY COMMISSION, and
THE BANK OF GHANA,

Petitioners,

- against -

SIDNEY H. REICH, as Trustee of the
estate of Trefalcon Corporation,
Bankrupt,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI**

JOHN W. FINLEY, JR.
Attorney for Respondent

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QUESTIONS PRESENTED

1. Whether the petition for certiorari invoking jurisdiction under 28 U.S.C. § 1254(1) meets the review standard of the Court under its Rule 17.

2. If jurisdiction be exercised by the Court, whether the Circuit panel committed reversible error in denying to Petitioners a writ of mandamus for the purpose(s) set forth by Petitioners, quoted in Appendix B hereof.

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RESPONDENTS STATEMENT OF THE CASE

By voluntary petition filed October 20, 1976 in the District of Maryland, Trefalcon Corporation ("Trefalcon") sought protection under Chapter XI of the Bankruptcy Act of 1898 (the "Act").¹ Subsequently, Trefalcon was adjudicated a Bankrupt on April 17, 1985 and that same day Respondent's predecessor was appointed trustee.

A motion was thereafter made on behalf of aggrieved creditors to secure transfer of the Bankruptcy case to New York's Southern District. Following a hearing the District Court at Baltimore ordered the requested transfer on July 25, 1986.²

Subsequently, a motion was made by creditors for the removal of the Maryland trustee. On March 27, 1987, the relief sought was stipulated and by Order entered thereon, Respondent was appointed and duly qualified as

¹ This case was commenced under the National Bankruptcy Act (Act of July 1, 1898, c. 541), 30 Stat. 544, codified as the former Title 11, United States Code, as amended. The Bankruptcy Code (P.L. 95-598, Title I, § 101 et seq., of November 6, 1978), codified as the present Title 11, United States Code (hereinafter the "Code"), as amended, while repealing the Act saved to cases commenced under the Act the applicability of the Act: § 403(a) of Public Law 95-598, 92 Stat. 2683.

² The Maryland District Court under the Act was a Court of Bankruptcy; Act § 1(10). That Court was, under the Act, enabled to "... transfer cases to other Courts of Bankruptcy." Act, § 2a(19). After receipt of the files from Maryland, the District Court for the Southern District Of New York (Lowe, D.J.) ordered on November 20, 1986, the transfer of the entire case to the Bankruptcy Court for the Southern District of New York (Blackshear, B.J.).

successor trustee on April 14, 1987. Two days later, on April 16, 1987, this adversary proceeding was commenced by the Respondent as plaintiff to recover indebtedness and damages owed the estate of Trefalcon Corporation. Pursuant to the terms of the Foreign Sovereign Immunities Act,³ all Defendants were served as therein provided.

By Answer⁴ to the Trustee's Complaint, the Defendants asserted various affirmative defenses and moved for summary judgment under B.R. 7056, asserting, alternatively, that (a) this proceeding could not be maintained because of a time-bar, and (b) the Southern District of New York was an inconvenient forum for the Defendants. At oral argument the latter ground was abandoned and by Order entered on the December 7, 1988 Opinion and Decision of the Bankruptcy Court, the motion was denied.

³ Act of October 21, 1976, 90 Stat. 2891, Chapter 97, Title 28, U.S. Code, § 1602 et seq., as amended ("FSIA").

⁴ Their Answer, dated December 3, 1987, has not been reproduced by petitioners. However, it denied the character of the parties, jurisdiction, and venue; it admitted that the Ghana Supply Commission ("GSC") with Trefalcon had on or about March 18, 1974 entered into the Agreement (concerning the transportation of crude oil and refinery products, the sale of fuel oil to Trefalcon, and other matters) annexed as Exhibit "1" to the Complaint, and that it was a true copy of the original. The Answer denied the essential terms of the Agreement, denied a written offer and a written acceptance made by those parties concerning the sale of residual fuel oil, and denied further that copies thereof annexed as exhibits "2" and "3" to

Petitioners served and filed their notice of appeal from the Decision, prior to the entry of the Order on December 20, 1988. The Trustee served his motion to dismiss the appeal on February 10, 1989. Petitioners then moved for leave to appeal, after filing a brief on the merits. The District Court's Memorandum Endorsement of April 26, 1989, which denied leave to appeal, followed. It is reproduced in the Appendix to the Petition (at A-2, A-3) as Appendix B.

Petitioners in May, 1989 next sought a Writ of Mandamus from the Court of Appeals for the Second Circuit. A panel of the Court of Appeals denied a writ on June 12, 1989. See Petitioners' Appendix "A," at A-1.⁵

Petitioners now seek a Writ of Certiorari directed to the Second Circuit, putting in issue that decision of the panel.

(Continued from previous page)

the Complaint were true. Of the first 36 paragraphs of the Complaint, reproduced in Petitioners' Appendix as "D" at A-11 through A-17, only paragraph 9 was admitted. Respondent has reproduced the balance of his Complaint, consisting of 29 paragraphs and five additional causes of action, as an Appendix "A" to this Brief. None of those allegations has been admitted.

⁵ Precisely what was sought in the Circuit by Petitioners was less than clear, as may be seen from their prayer for relief, reproduced as Respondent's Appendix "B." The petition in the Circuit appeared to request that the Circuit certify a question to the District. The Petitioners' statement of the case, however, now asserts [page 1 at (2)] that "[t]he District Court denied certification of the issue for an interlocutory appeal," though no application for such relief was made as distinguished from their motion in the District Court for leave to appeal.

REASONS FOR DENYING THE WRIT

Summary

The Petition omits awareness of Rule 17.1 of the Court. It does not reflect an abuse of discretion, by the Circuit panel in denying a writ of mandamus, which merits the intervention of the Court. To the contrary the Circuit, on the same grounds Petitioners here advance, failed to find that there was a question of law as to which there was a need for instruction by this court under 28 U.S.C. § 1254(3). Nor do Petitioners demonstrate an abuse of discretion by the District Court in denying an interlocutory appeal from the Order of the Bankruptcy Court. Instead, Petitioners have invoked unfounded claims of prejudice which are *dehors* the record and consist only of conjecture. Finally, but not least among the reasons justifying denial of the petition is the fact that the arguments advanced by Petitioners cannot and will not affect any other case nor lead to a needed clarification of the law for prospective application.

(I)

The Rules of this Court enjoin prospective petitioners to heed Rule 17. In pertinent part it provides:

"Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

... "

The Petition offers no explanation of the way in which Petitioners would contend that they present a question which merits the supervision or intervention of the Court.

"Special and important reasons" suggests the prospect of correction of some egregious wrong overlooked in the Bankruptcy and District Courts. In the former, Petitioners were afforded ample opportunity to substantiate how they would be unfairly burdened by the Trustee's case. They availed of the opportunity to argue the law and the facts, and came up short.

On the other hand, Petitioners initiated and continued through 1980 an oppressive, costly, and groundless

action in the District of Massachusetts as set forth in the Respondent Trustee's Complaint paragraph 63.

(II)

The Bankruptcy Court Opinion addressed the merits of the Petitioners' motion as argued to the Court. Reproduced in the Petition, it discloses no egregious error. Instead, it precisely illustrated a careful awareness of Congressional intent concerning balancing competing wants and needs of creditors and the Petitioners. That the Bankruptcy Code might prove more fortuitous for Petitioners is of no moment: as noted, note 1 above, Congress saw fit for the Act to apply in the specifics of this case. It would be an egregious wrong for the Act **not** to apply, in light of the Trustee's Statement of the Case, *supra*, and the allegations of his Complaint which Petitioners chose to omit. See Respondent's Appendix A.

(III)

The District Court, in functioning as an appellate court, recognized the substantial flaw in that appeal as a failure to demonstrate " . . . a substantial ground' to differ with Judge Blackshear's ruling." Petitioners' Appendix B, at A-3.

(IV)

As night follows day, the Court of Appeals, as the third court to be involved, found no ground for an extraordinary writ, let alone a need for certifying a question under 28 U.S.C. § 1254(3).

(V)

The Trustee's action was not brought without careful analysis. It is a serious action that the Complaint reflects. Petitioners understandably seek to escape a heavy burden which the Trustee's action portends. Respondent Trustee at this point respectfully urges that Petitioners have had more than ample opportunity to supply the courts below with any meritorious arguments, and were found wanting. The action should now proceed.

Allowance of the writ would have no significance as precedent since the provisions of the Bankruptcy Act below at issue were altered so that the issue below cannot arise under the Bankruptcy Code. Thus the prospect of a similar, subsequent case is astronomically small.

CONCLUSION

The Petition for a writ of certiorari to the U.S. Court of Appeals for the Second Circuit should be denied.

Dated: White Plains, New York
October 28, 1989

Respectfully submitted,

JOHN W. FINLEY, JR.
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Sidney H. Reich, Trustee

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APPENDIX "A"

COMPLAINT (Para. 37 - end)

AS AND FOR A SECOND CAUSE OF ACTION
AGAINST ALL DEFENDANTS

37. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

38. Pursuant to and in conformity with the Agreement's terms, Trefalcon arranged for and provided vessels for the carriage of GSC's cargoes of crude petroleum and refined oil products.

39. Pursuant to the Agreement, GSC caused a letter of credit to be issued by Defendant BANK OF GHANA to the favor of Trefalcon, no. MAN/800/74/85, in the amount of five million (\$5,000,000.00) dollars, which was lodged at and confirmed by Manufacturers Hanover Trust Company at 350 Park Avenue, New York, New York, to Trefalcon. A true copy thereof is annexed as Exhibit "6".

40. Though by its terms the letter of credit had expired on September 30, 1974, the Defendants caused Manufacturers Hanover Trust Company at 350 Park Avenue, New York, New York, to continue to honor the drafts of and make repeated payments to Trefalcon for its services into 1975.

41. In February, 1975, a replacement letter of credit, identical in form except drawn in the amount of four million (\$4,000,000.00) dollars, to expire December 31, 1975, and designated no. MAN 800/75/7 was lodged at

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and confirmed by Manufacturers Hanover Trust Company at 350 Park Avenue, New York, New York, to Trefalcon. A true copy thereof is annexed as Exhibit "7".

42. Though Trefalcon was performing in compliance with the Agreement, and GSC was heavily indebted to Trefalcon at the time, GSC abruptly terminated on July 8, 1975 that aspect of the Agreement by which Trefalcon transported GSC's cargoes.

43. In furtherance of GSC's unlawful termination of the Agreement, GSC advised or instructed BANK at that time that the Agreement was not in effect and that no further payments were to be made to Trefalcon.

44. Upon the advice of GSC, BANK issued instructions to Manufacturers Hanover Trust Company in New York not to make any further payments to Trefalcon.

45. At no time did GSC initiate or even seek, or notify Trefalcon of a request of GSC for, or of an intention of GSC to seek, arbitration of any dispute or difference concerning the Agreement with Trefalcon or that aspect of it dealing with Trefalcon's carriage of GSC's cargoes.

46. At no time prior to July 8, 1975, did GSC give notice to Trefalcon of an intent to terminate the Agreement.

47. The unilateral termination by GSC of the Agreement was wrongful, intentional, without legal justification or excuse, and in direct conflict with the obligation undertaken by GSC in the Agreement to seek arbitration as its exclusive remedy for resolution of all differences and disputes not settled by agreement, relating to the

interpretation or performance under the Agreement or the rights and liabilities of the parties.

48. By reason of GSC's willful and wrongful termination of the Agreement, and GSC's and BANK's wrongful termination of the letter of credit, Trefalcon sustained damage relating to the transport of GSC's cargoes in the amount of five million, two hundred seventy-nine thousand five hundred seventy-four (\$5,279,574.46) and 46/100 dollars, which sum was due in 1975 and demanded by Trefalcon of GSC but never paid, and with lawful interest thereon remains owed to Plaintiff by the Defendants.

*AS AND FOR A THIRD CAUSE OF ACTION
AGAINST ALL DEFENDANTS*

49. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

50. The actions of the Defendants GSC and BANK, in repudiating the Agreement, the May 3rd offer and acceptance, and the undertakings expressed and implied in the letters of credit and course of dealing established between and among Trefalcon and the Defendants, render them jointly and severally liable for the consequential damages of Trefalcon produced by the cessation of payments to Trefalcon and the continuing obligations which Trefalcon was required to meet.

51. As a direct consequence of the actions of the Defendants, Trefalcon lost all revenues, was unable to continue operations, was obliged to discharge its employees, surrender its offices, and was unable to retain advantageous contract and other rights, including Trefalcon's rights under a mining concession in Greece with

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proven ore reserves worth in excess of twenty-six million (\$26,000,000.00) dollars.

52. Upon information and belief Trefalcon's consequential damage suffered as a consequence of the Defendants' acts is a sum in excess of and not less than twenty-six million (\$26,000,000.00) dollars, plus interest accrued thereon from July of 1975.

*AS AND FOR A FOURTH CAUSE OF ACTION
AGAINST DEFENDANTS REPUBLIC OF GHANA
AND GHANA SUPPLY COMMISSION*

53. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

54. The Defendants GHANA and GSC are indebted for all sums claimed under the First Cause of Action, which if not paid result in the unjust enrichment of those Defendants brought about by the wilfull misconduct of GSC.

*AS AND FOR A FIFTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS*

55. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

56. All Defendants are indebted for all sums claimed under the Second Cause of Action, which if not paid result in the unjust enrichment of the Defendants brought about by the wilfull misconduct of GSC and BANK.

AS AND FOR A SIXTH CAUSE OF ACTION
AGAINST DEFENDANTS REPUBLIC OF GHANA
AND GHANA SUPPLY COMMISSION

57. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

58. Defendant GSC intentionally repudiated the Agreement with Trefalcon in order to procure for various persons within the hierarchy of the GSC as it was then composed, unlawful financial consideration in the form of payments to be received from the entity succeeding to Trefalcon's contractual rights to purchase RFO from GSC under the Agreement.

59. The intentional repudiation of Trefalcon's Agreement by GSC was, upon information and belief, the unlawful aim, purpose, and intent of a conspiracy between and among GSC and a Connecticut corporation to which GSC thereafter sold its RFO, INCONTRADE CORPORATION ("Incontrade").

60. In furtherance of the unlawful scheme to abrogate the Agreement with Trefalcon, GSC commenced a series of escalating demands in early 1975 which continued until GSC's repudiation, seeking prices higher than agreed upon for RFO it was obliged to sell to Trefalcon.

61. Notwithstanding Trefalcon's payment of the agreed base price for cargoes of RFO, and Trefalcon's protests that amounts invoiced by GSC in excess thereof were incorrect and had to be recalculated in accordance with the Agreement and May 3rd offer and acceptance, GSC purposefully, and with knowledge of the terms of the Agreement which it had dictated to Trefalcon, and the terms of the May 3rd offer and acceptance, did not seek to reach an agreement of settlement as required by the Agreement, did not proceed to arbitration over its alleged

difference with Trefalcon as the sole remedy provided by the Agreement, but chose instead to declare the Agreement terminated, refused to provide proper lifting schedules, falsely informed Trefalcon by means of wire and mails that its reimbursements of expenses to which Trefalcon was contractually entitled would be paid if the documents sent by Trefalcon to GSC at Accra were instead presented to Manufacturer's Hanover Trust Company for payment in New York City, at which bank GSC had previously opened successive irrevocable letters of credit to Trefalcon's credit and referable to the Agreement, when in fact GSC had concealed from Trefalcon its knowledge that it had already instructed said bank not to pay and had with said bank's cooperation cancelled the previously irrevocable letter of credit.

62. In furtherance of its unlawful scheme to abrogate the Agreement with Trefalcon and forever ruin the good name and reputation of Trefalcon, to deny it any fair chance at minimal due process of law in Ghana, and upon information and belief to cover and conceal the scheme upon which it had embarked, GSC thereafter commenced, authorized, aided and abetted, and participated in a series of unfounded complaints, "tips," and "leaks," to representatives of its own government and that of the United States, subjecting Trefalcon and certain of its representatives to baseless criminal investigations and unfounded intimations of misconduct, further burdening Trefalcon and its principals unnecessarily with the need to respond to such inquiries in order to be exonerated.

63. In furtherance of its unlawful scheme aforesaid, GSC waived, and GHANA waived as well, any defense of

sovereign immunity in the Courts of the United States with respect to subject matter jurisdiction of the Agreement and of this action, by commencing a groundless lawsuit in the United States District Court for the District of Massachusetts against the ultimate purchaser from Trefalcon of the various cargoes of RFO, claiming, *inter alia*, that the defendant in that action, NEW ENGLAND POWER COMPANY (herein "NEPA"), owed GSC more than twenty-six million (\$26,000,000.00) dollars because Trefalcon had stolen the RFO cargoes and NEPA thus could not take title to the cargoes from Trefalcon. As a consequence of that action, NEPA impleaded its purchasing agent, INCONTRADE, which in turn impleaded Trefalcon though INCONTRADE knew that Trefalcon had already filed for Chapter XI relief in the District of Maryland. GSC thereafter abandoned any pretense of the merit of its action and it was dismissed by Order of the District Court on March 10, 1980, following GSC's default in responding to discovery and notice for trial. A true copy of the Order of Dismissal is annexed as Exhibit "8".

64. By reason of the intentional wrongs committed by GSC and other persons and entities acting in concert with GSC against Trefalcon without legal excuse and which deprived it of a substantial and profitable business, Trefalcon was unable to meet its obligations, driven out of business, forced to seek relief under the Bankruptcy Act, and damaged irreparably in name and reputation, for which misconduct the Defendants GHANA and GSC are responsible and should be held liable for all consequential damages which, exclusive of interest, upon information and belief are believed to be in excess of thirty-five million (\$35,000,000.00) dollars.

65. By reason of the intentional wrongs committed by GSC and other persons and entities acting in concert with GSC against Trefalcon without legal excuse and which deprived it of a substantial and profitable business, Trefalcon was unable to meet its obligations, driven out of business, forced to seek relief under the Bankruptcy Act, and damaged irreparably in name and reputation, for which misconduct the Defendants are responsible and should be held to respond in punitive damages of not less than fifty million (\$50,000,000.00) dollars for which Plaintiff prays judgment against the Defendants.

WHEREFORE, Plaintiff demands judgment against the Defendants:

Upon the First Cause of Action in the sum of \$4,089,102.05 with interest from June 1, 1975;

Upon the Second Cause of Action in the sum of \$5,279,574.46 with interest from July 1, 1975;

Upon the Third Cause of Action in a sum of not less than \$26,000,000.00 with interest from July 1, 1975;

Upon the Fourth Cause of Action in the sum of \$4,089,102.05 with interest from June 1, 1975;

Upon the Fifth Cause of Action in the sum of \$5,279,574.46 with interest from July 1, 1975; and

Upon the Sixth Cause of Action in the sum of \$35,000,000.00 as and for consequential damages, and punitive damages in the sum of \$50,000,000.00;

Together with an award of such costs, disbursements and counsel fees as many be allowed by law.

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Dated: New York, New York

April 15, 1987

Yours, etc.

JOHN W. FINLEY, JR.
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APPENDIX "B"

Extract from MANDAMUS PETITION

" . . .

WHEREFORE, the petitioners respectfully request that this Court issue a writ of mandamus certifying the issue raised on appeal to the District Court, arising from the bankruptcy adversary proceeding, regarding the statute of limitations bar to the plaintiff's claims; that such issue be determined by an interlocutory appeal under the facts and circumstances of this case; and for such other and further relief as the Court may deem just and proper.

DATED: New York, New York

May 22, 1989

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